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NO. 28

IN THE
Supreme Court of the United States

OCTOBER TERM, 1965

LOUIS KATCHEN,
Petitioner,

VS.

HYMAN D. LANDY, Trustee in Bankruptcy,
Respondent.

In the Matter of
KATCHEN'S BONUS CORNER, INC., Bankrupt
ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONER

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OPINION BELOW

The opinion of the Court of Appeals (R. 8-23) is reported at 336 F.2d 535.

JURISDICTION

The judgment of the Court of Appeals was entered September 9, 1964 (R. 23). The petition for a writ of

certiorari was filed December 7, 1964, and was granted April 26, 1965. Jurisdiction is based on 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

Does any Act of Congress grant to a referee in bankruptcy the power to exercise summary jurisdiction over a counterclaim by the trustee against a claimant where the claimant objects to summary jurisdiction?

Does the guarantee of the Seventh Amendment of trial by jury prevent the exercise of summary jurisdiction over a counterclaim by the trustee against a claimant where that guarantee would be fully applicable except for the filing of the claim in the bankruptcy proceeding?

CONSTITUTION AND STATUTES INVOLVED

The constitutional provision in question is Article VII of the Amendments to the United States Constitution:

"Jury trial in civil actions.—In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

The statutory provision involved are Sections 60(b) and 2(a)(7) of the Bankruptcy Act, 11 U.S.C. Sections 96(b) and 11(a)(7). They are printed in Appendix A.

STATEMENT

This is a voluntary bankruptcy proceeding involving Katchen's Bonus Corner, Inc., a Colorado corporation (R. 2). The controversy here began when petitioner filed two claims in the bankruptcy proceeding (R. 5, 6). The trustee then filed counterclaims against petitioner. Petitioner promptly objected to the summary jurisdiction of the ref-

eree (R. 2). The objection was overruled by the referee who held that petitioner, by filing the claims, consented to his summary jurisdiction (R. 2). Judgment on the counter-claims was entered by the referee (R. 4, 5). Whether the referee had the right to exercise summary jurisdiction is the question presented.

In April, 1960, the bankrupt corporation borrowed \$40,000 from the American National Bank and gave its note upon which petitioner was an accommodation maker. In June, 1960, the corporation borrowed \$10,000 from the North Denver Bank, giving a note upon which petitioner was again an accommodation maker (R. 2, 3).

In October and November, 1960, the bankrupt corporation made payments of \$24,736.50 on the \$40,000 note at the American National Bank. In September, 1960, the bankrupt made a payment of \$10,162.50 on the note at the North Denver Bank. These payments were made within four months of the filing of the petition in bankruptcy (R. 3, 4).

After the bankruptcy proceeding began, petitioner filed two claims. The first was for \$5,000 representing a payment made by him as an accommodation maker on the \$40,000 note at the American National Bank. The second claim was for \$4,625 for rent due to him from the bankrupt (R. 1, 5, 6).

After these claims were filed, the trustee filed counter-claims against petitioner. The trustee asserted the petitioner had received preferential transfers when the bankrupt made the \$24,736.50 payments on the American National Bank note and the \$10,162.50 payment on the North Denver Bank note. The trustee further claimed that petitioner owed \$10,000 because he had promised to pay the bankrupt that amount for capital stock (R. 1, 4). After a summary trial on the various factual issues, the referee made findings of fact and entered judgment for the trustee

against petitioner on all of these counterclaims (R. 5). The District Court adopted all of the findings and conclusions of the referee and affirmed the judgment (R. 6).

The Tenth Circuit, en banc, unanimously reversed the \$10,000 judgment based on the promise to pay for capital stock holding that the filing of a claim does not give the referee summary jurisdiction over counterclaims which do not involve a preference, set-off, voidable lien, or a fraudulent transfer, and which are wholly unrelated to the creditor's claim. However, by a 4-3 decision, the Court "upheld the power of the bankruptcy court to entertain a counterclaim to fully adjudicate and recover a Section 57(g) preference [preferential transfer] whether such a counterclaim is compulsory under Rule 13(a) or permissive under Rule 13(b), F.R.C.P." (R. 9, 11).

SUMMARY OF ARGUMENT

This Court has ruled several times that a referee in bankruptcy has summary jurisdiction only to the extent specifically granted by Congress. There is no Act granting such jurisdiction over a counterclaim by a trustee against a claimant, where the claimant objects to the summary hearing. The Supreme Court has in fact held, in circumstances as exist here, that summary jurisdiction does not exist and that a plenary trial must be held. Since those decisions, there has been no change in the Bankruptcy Act which would justify the holding below.

Amendment VII of the Constitution guarantees trial by jury. The law is clear that petitioner (had he not filed a claim) would be entitled to a trial by jury in an action by the trustee to recover preferential transfers. Yet, the court below held that petitioner, by filing a claim in the bankruptcy proceedings, gave up that right. Thus, a claimant is given the choice of giving up his fundamental right to file and recover on a claim in bankruptcy or giving up his constitutional right to trial by jury on a counterclaim.

Such a condition on this constitutional right violates Amendment VII.

I. NO ACT OF CONGRESS GRANTS TO A REFEREE IN BANKRUPTCY THE POWER TO EXERCISE SUMMARY JURISDICTION OVER A COUNTERCLAIM BY THE TRUSTEE AGAINST A CLAIMANT WHERE THE CLAIMANT OBJECTS TO SUMMARY JURISDICTION.

This case concerns the summary jurisdiction of the referee in bankruptcy. The Court below held that the referee had summary jurisdiction to enter judgments against petitioner on the "counterclaims" based on preferential transfers. Petitioner contends that the referee is without such jurisdiction and that the trustee must bring an independent action with the rights of a plenary trial, including a jury.

There is no dispute that a trustee cannot in a summary proceeding recover a judgment against a person who has not consented or who has entered no sort of appearance in the bankruptcy proceeding. *Cline v. Kaplan*, 323 U.S. 97. The issue here is whether petitioner, by filing claims, thereby consented to the referee's summary jurisdiction on counterclaims, even though petitioner promptly objected to the summary jurisdiction after the counterclaims were filed (R. 2). Petitioner contends that no section of the Bankruptcy Act and no decision of this Court permits summary jurisdiction.

Historically, this court has been called upon from time to time to remind the lower courts that summary jurisdiction exists only when expressly authorized.

Thus, in an early case, *Ester v. Gaff*, 91 U.S. 521, 525, this Court said:

"The opinion seems to have been quite prevalent in many quarters at one time, that, the moment a man is declared bankrupt, the District Court which has so adjudged draws to itself by that act not only all con-

trol of the bankrupt's property and credits, but that no one can litigate with the assignee contested rights in any other court, except so far as the Circuit Courts have concurrent jurisdiction, and that other courts can proceed no further in suits of which they had at that time full cognizance; and it was a prevalent practice to bring any person, who contested with the assignee any matter growing out of dispute rights of property or of contracts, into the bankrupt court by the service of a rule to show cause, and to dispose of their rights in a summary way. This court has steadily set its face against this view. * * *

The view of this Court has not changed through the years. In *Bardes v. Hawarden Bank*, 178 U.S. 524, the trustee brought an action in federal district court to set aside a fraudulent transfer made within four months before institution of bankruptcy proceedings. The Court, after extensive review of the Bankruptcy Act, held that there was no federal court jurisdiction (where under the Act at that time the claim of federal court jurisdiction was dependent upon the same argument as the claim of summary jurisdiction here).

A case close in point to the present one is *Pickens v. Roy*, 187 U.S. 177, 130. Roy had filed a claim in the bankruptcy proceedings just as did petitioner here. The trustee then sought in federal court an order for Roy to turn over property allegedly belonging to the bankrupt. This court held that the filing of the claim did not amount to a consent to the exercise of jurisdiction by the federal court.

In *Louisville Trust Company v. Comingor*, 184 U.S. 18, 25, the referee ordered a state court receiver to pay over certain sums of money to the trustee, although the receiver objected to the jurisdiction of the referee. It was held that without consent, there was no jurisdiction:

"The proceeding was purely summary. The determination of the merits on the facts was not open to revision by appeal or writ of error under the bankrupt law. If Comingor had been entitled to a trial by

jury, he could not have obtained it as of right. The collection of the amounts found due would be enforceable not by execution but by commitment."

The eighth circuit was reversed in *Galbraith v. Vallely*, 256 U.S. 46, a case which govern the present dispute. Prior to bankruptcy, the bankrupt had made an assignment for the benefit of his creditors to Galbraith who performed as trustee. Shortly thereafter, the debtor was declared bankrupt. Galbraith appeared in the bankruptcy proceedings and filed an account, claiming therein the right to retain a certain sum for fees and disbursements under the assignment, and paid over to the trustee the other moneys he had acquired. Thereupon, the trustee filed a counterclaim asking, in a summary proceeding, for an order upon Galbraith to show cause why he should not pay over the sum of \$1,474.10 retained as fees and expenses. Galbraith unsuccessfully challenged the jurisdiction of the referee to hear the counterclaim. This Court held that there was no jurisdiction, page 50:

"It may be, as suggested by the Circuit Court of Appeals, that a summary proceeding at the instance of the trustee would afford a more speedy and economical administration of the estate in bankruptcy. But the right to recover in such instances, only in suits of the ordinary character, with the rights and remedies incident thereto, has been consistently maintained by this court. * * *"

The argument that Galbraith had waived his right to a plenary trial was rejected.

The second circuit was reversed in *Taubel-Scott-Kitzmiller Co. v. Fox*, 264 U.S. 426. The creditor had obtained a judgment within four months of bankruptcy and the sheriff had taken possession of some property in execution. The trustee sought, by a summary proceeding before the referee, to have the lien on execution declared void and to obtain possession of the property. Although the creditor objected to the jurisdiction, judgment was rendered. This Court held there there was no summary jurisdiction.

Once more this Court restated the right to a plenary trial in *Daniel v. Guaranty Trust Co.*, 285 U.S. 154, 161:

"In the circumstances, did the referee have jurisdiction to enter the turnover order against the trust company? The answer must be 'No' unless that company by filing its petition for reclamation entered its general appearance and in effect consented to submit itself to summary proceedings before that officer in respect of matters having no immediate relation to the claim which it had presented.

"In practice such a rule might lead to unfortunate complications and deprive owners of property of fair opportunity to recover. The risk incident to a general appearance and consent to adjudication of claims of all kinds might easily deter where the right to recover is clear. Moreover, the choice would not be between tribunals merely, but between the ordinary processes of a plenary suit and a summary hearing. We are not cited to any opinion by an appellate court which definitely approves the view advanced by the petitioner. We cannot conclude that the demand for speedy administration of bankrupt estates is enough to justify such a radical departure from ordinary procedure. And the suggestion that it is possible to impose equitable terms as a condition to an order of reclamation is not helpful. No such conditional order was proposed or entered."

The last decision in the series in *Cline v. Kaplan*, 323 U.S. 97, where the question was merely whether Kaplan had objected soon enough to summary jurisdiction on a turnover order. The Court determined that the objection made prior to the final order was timely.

Thus, it is clear that this Court has consistently held that there is no summary jurisdiction of lawsuits between the trustee and an adverse litigant unless the adverse party consents (with some exceptions not pertinent). And on at least two occasions it has been held that the filing of a claim or petition in the proceeding does not constitute a consent to summary jurisdiction of a counterclaim.

In spite of these decisions, the history is again being repeated, and the lower federal courts are once more holding that the referee has summary jurisdiction where this court has held it did not exist. The first 10th Circuit case was *Inter-State Bank v. Luther*, 221 F.2d 382, where judgment was entered on a counterclaim against a claimant based on a voidable preference, even though the claimant objected. That Court reasoned that there was implied consent to summary jurisdiction by the filing of a claim. The Supreme Court granted certiorari in that case, 350 U.S. 810. Certiorari was dismissed by stipulation of the parties in the *Luther* case, 350 U.S. 944.

Nor is the Tenth the only circuit extending summary jurisdiction, although different rules have been adopted by the circuits. Thus, the 10th has ruled for jurisdiction of any counterclaim based on a preferential transfer whether the counterclaim is "compulsory" or "permissive." The Fifth Circuit reached the opposite conclusion in *Gill v. Phillips*, 337 F.2d 258, and *Avery v. Davis*, 192 F.2d 255, although on rehearing in the *Gill* case, that Court indicated it might find jurisdiction if the counterclaim were compulsory, 340 F.2d 318.

The Seventh Circuit in *In re Majestic Radio*, 227 F.2d 152, held that summary jurisdiction did not exist over a permissive counterclaim against a claimant. Other circuits have permitted summary jurisdiction of some compulsory counterclaims, but in so holding have carefully noted that they were not permissive. *Continental Casualty Company v. White*, 4 Cir., 269 F.2d 213; *In re Solar Manufacturing Corporation*, 3 Cir., 200 F.2d 327; *Peters v. Lines*, 9 Cir., 275 F.2d 919.

We believe that there is no justification for the Circuits to allow summary jurisdiction and that once more this Court must rule that there is no such jurisdiction. The only reason for ignoring the decisions of this Court would be a

change in the Bankruptcy Act. But there has been no such change.

It is most difficult to review the various sections of the Act to show that summary jurisdiction is not granted. It is even more difficult because the majority opinions in this case and in the *Luther* case nowhere state just what sections are relied upon. See *Inter-State Bank v. Luther*, 221 F.2d 390.

Section 23 of the Bankruptcy Act, 11 U.S.C. 46, provides for federal court jurisdiction in cases between trustees and adverse claimants to the same extent as though the proceedings had been between the bankrupt and the claimant. Section (b) provides for concurrent federal court jurisdiction on controversies about preferential transfers. But this section confers plenary jurisdiction, not summary. See *Taubel-Scott-Kitzmillier Co., v. Fox*, 264 U.S. 426, 431.

Section 60(b), 11 U.S.C. 96(b) states that preferential transfers may be avoided by the trustee, and provides for concurrent federal and state court jurisdiction "where plenary proceedings are necessary."

There is not a single section of the Bankruptcy Act which confers summary jurisdiction in this situation. The only change relating to jurisdiction after the last decision of this Court is the amendment to Section 2a (7), 11 U.S.C. 11, to provide that "where in a controversy arising in a proceeding under this title an adverse party does not interpose objection to the summary jurisdiction of the court of bankruptcy, by answer or motion filed before the expiration of the time prescribed by law or rule of court or fixed or extended by order of court for the filing of an answer to the petition, motion or other pleading to which he is adverse, he shall be deemed to have consented to such jurisdiction." This was apparently designed to change the rule in *Cline v. Kaplan*, 323 U.S. 97, that objection to summary jurisdiction could be made anytime prior to the determination by

the referee. This does not confer summary jurisdiction here because petitioner objected promptly to the proceeding before the referee (R. 2).

It is hinted, in the majority opinion in the *Luther* case, that Section 2 of the Act, 11 U.S.C. 11, which created the Courts of Bankruptcy, together with the sections on voidable preferences somehow confer summary jurisdiction. But this argument has previously been rejected by the Supreme Court. *Lathrop v. Drake*, 91 U.S. 516. *Bardes v. Hawarden Bank*, 178 U.S. 524, 531; *Daniel v. Guaranty Trust Co.*, 285 U.S. 154, 162.

Clearly, the Bankruptcy Act does not confer summary jurisdiction in this case.

The next question is whether there is something different about the counterclaims here because they are based on alleged preferential transfers. The Tenth Circuit has ruled that counterclaims involving preferences should be treated differently. See *Inter-State Bank v. Luther*, 221 F. 2d 382, 389; *Katchen v. Landy*, (R. 15). It is argued that it is the duty of the trustee to void preferential transfers under Section 60(b) and that a claim of a creditor cannot be allowed unless the creditor surrenders any preferences under Section 57g. Then it is asserted that the determination by the referee under Section 57g, disallowing the claim because of a preferential transfer to claimant would result in the preference issue being *res judicata* in a subsequent plenary action between the claimant and the trustee. Thus, the argument continues, it would be absurd to require a plenary action.

This reasoning, of course, begs the question. If the referee does not have summary jurisdiction, then his determination of the preference issue could not be *res judicata* because that determination would be a nullity.

This exact argument was long ago rejected by the Supreme Court in *Taubel-Scott-Kitzmiller Co. v. Fox*, 264

U.S. 426. There the referee in a summary proceeding voided a preferential lien held by a creditor and ordered the property delivered to the trustee. This Court said, page 435:

"The argument is that, since the bankruptcy court is expressly empowered to order that a lien void as against the trustee shall be preserved for the benefit of the estate, it was given, by implication, jurisdiction to determine whether the lien is void. The argument proceeds upon a misapprehension of the nature and purpose of the clause in question. *It does not confer jurisdiction.* It confers substantive and adjective rights. * * *" (Emphasis Supplied.)

Likewise, in this case, the preferential transfer sections of the Bankruptcy Act do not confer summary jurisdiction.

One additional issue in this case is whether there should be any jurisdictional distinction between "compulsory" counterclaims and "permissive" counterclaims brought by the trustee against the claimant. Some Courts of Appeal have made the distinction. See *In re Solar Manufacturing Corporation*, 3 Cir., 200 F.2d 327; *In re Majestic Radio*, 7 Cir., 227 F.2d 152. The Tenth is perhaps the only Circuit which permits summary jurisdiction over any preference counterclaim, even if it is permissive (R. 9).

It should be noted that the transfers to the American National Bank by the bankrupt corporation might be considered to arise out of the same transaction as the claim filed by petitioner for his own payment to this bank (R. 5, 6). The transfer by the bankrupt to the North Denver Bank did not arise out of any transaction involving either of the claims filed by petitioner.

We believe there is no greater ground for summary jurisdiction of a compulsory counterclaim than of a permissive one. In fact, this Court effectively disposed of this question in *Galbraith v. Valley*, 256 U.S. 46, where Galbraith filed a claim for services as assignee for the benefit of creditors which services were performed just prior to

bankruptcy. The trustee counterclaimed for monies withheld by Galbraith in payment of these same services. Clearly, such a counterclaim would be described as compulsory. Yet, this Court held that there was no summary jurisdiction of the counterclaim.

Hence, it is of no aid to summary jurisdiction that two of the counterclaims here may be compulsory. Actually, to even describe such a counterclaim as compulsory is inaccurate where there is no jurisdiction in the referee to determine the matter.

The Tenth Circuit, in extending summary jurisdiction, placed reliance on *Alexander v. Hillman*, 296 U.S. 222. This was federal equity receivership proceeding in district court. The claimants filed and proved claims to shares in the distribution of the receivership property. The receiver counterclaimed for certain relief cognizable in equity. The claimants challenged the jurisdiction, but this Court held that there was jurisdiction in the district court to determine the counterclaims. We think that case is no authority here. It was a proceeding in equity, not a summary proceeding in bankruptcy. Further, the real issue was probably one of venue—whether the counterclaims had to be brought in Pennsylvania where all respondents resided. Certainly, this Court in that decision did not overrule its many previous rulings on summary jurisdiction in bankruptcy.

This Court has repeatedly held that a referee has summary jurisdiction only to the extent specifically granted by Congress. There is no Act granting a referee summary jurisdiction of a counterclaim by the trustee against a claimant, where the claimant objects. The court below was in error in holding that the referee had summary jurisdiction.

II. AMENDMENT VII OF THE CONSTITUTION, WHICH GUARANTEES A TRIAL BY JURY, IS VIOLATED IF THE BANKRUPTCY ACT GIVES A REFEREE SUMMARY JURISDICTION OVER A COUNTERCLAIM AGAINST A CLAIMANT.

Even if there were a statutory basis for summary jurisdiction, the decision below could not be sustained under the Seventh Amendment.

Three judges in the court below were of the opinion that petitioner was denied his constitutional right to a jury. Judge Phillips, writing the dissent, said as follows (R. 18) :

"I start with the premise that a jury trial cannot be had in a proceeding before a referee in bankruptcy.

"It is my opinion that the trustee cannot assert in a counterclaim to a claim filed by a creditor, a claim against the creditor, which, absent the filing of the claim by the creditor, the trustee could only have asserted in a plenary action in which the creditor would be entitled to a trial by jury, unless the creditor had consented to the summary determination of the trustee's claim by the referee; and further, that the filing of a claim by the creditor does not constitute such a consent.

"It will be observed that what I say is restricted to a trustee's claim of a character, which, if asserted in an ordinary plenary action, the defendant thereto would be entitled to a jury trial. It is so restricted, because the claim asserted by the trustee in each of the several counterclaims here involved is of that character.

"The reason for my conclusion may be simply stated. The right of a general creditor of the bankrupt to file a claim against the bankrupt estate, to have his claim determined, and, if allowed, to participate in the distribution of the bankrupt estate is a substantive and fundamental right. The privilege to exercise such a fundamental right may not be conditioned by a mere procedural rule on the surrender

of another distinct and nonalternative fundamental right of the creditor. The other right here involved is a constitutional right of the creditor to have a claim asserted against him by the trustee, absent his consent to the summary disposition thereof by the referee, determined on a trial by jury in a plenary action. The creditor may not be compelled to choose between the exercise of two distinct and nonalternative fundamental rights by Rule 13 of the Federal Rules of Civil Procedure."

There can be no doubt that if petitioner had not filed a claim, the trustee would have had to bring a plenary action to recover the alleged preferential transfer, and petitioner would have been entitled to a trial by jury. Section 60 (b) of the Bankruptcy Act, 11 U.S.C. 96 (b) ; *MacDonald v. Plymouth County Trust Co.*, 286 U.S. 263, 266 ; *Louisville Trust Company v. Comingor*, 184 U.S. 18, 25. And as these cases note, there is no provision for a trial by jury in a summary proceeding before a referee.

We know of no case in which this Court has ruled on whether the right to a jury trial can be conditioned on a claimant giving up his claim. However, in several decisions the Court has indicated that such a condition could not be imposed.

Thus, in *Louisville Trust Company v. Comingor*, 184 U.S. 18, 25, this Court ruled against summary jurisdiction on a counterclaim against a claimant. One of the reasons set forth was that "If Comingor had been entitled to a trial by jury, he could not have obtained it as of right."

In *Ester v. Gaff*, 91 U.S. 521, 525, the creditor was held not to lose his right to a plenary trial due to the bankruptcy of his adversary.

In *Daniel v. Guaranty Trust Co.*, 285 U.S. 154, 162, in declining to approve summary jurisdiction said: "In practice such a rule might lead to unfortunate complications and deprive owners of property of fair opportunity to re-

cover. The risk incident to a general appearance and consent to adjudication of claims of all kinds might easily deter where the right to recover is clear. Moreover, the choice would not be between tribunals merely, but between the ordinary processes in a plenary suit and a summary hearing. * * * See also *MacDonald v. Plymouth County Trust Co.*, 286 U.S. 263, 266, 267.

The majority opinion in the court below fails to mention the jury issue. But the concurring opinion of Judge Seth states that "The bankruptcy proceeding, like the right to trial by jury, has its origin in the Constitution and they are to that extent of equal dignity." (R. 15). The surprising implication is that the Bill of Rights does not apply to bankruptcy proceedings. This is not correct. For instance, this Court has held that the Fifth Amendment applies to Bankruptcy law, *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 602.

Nor is there any reason to suppose that a jury trial is a lesser right than due process. The same Section 8 of Article I of the Constitution grants Congress exclusive power over the District of Columbia, as grants Congress the power to establish uniform laws on bankruptcies. The power over the District has been called sovereign and plenary. Yet, this Court has held that the provisions of the constitution on jury trial are applicable to the District of Columbia. *Callan v. Wilson*, 127 U.S. 540, *Capital Traction v. Hof*, 174 U.S. 1, 5.

The majority below held that, because the counterclaims were joined in the proceeding with the claims where no jury is provided, there would be no jury on the counterclaims either, even though otherwise there would be a right to a jury on the counterclaim issues. The situation is no different than a lawsuit in which a claim cognizable only at law is united in the same case with a claim for equitable relief. This Court has held that the Seventh Amendment

requires a jury trial on the law issues. In *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 471, the Court said:

"The Federal Rules did not, however, purport to change the basic holding of *Scott v. Neely* that the right to trial by jury of legal claims must be preserved. Quite the contrary, Rule 38 (a) expressly reaffirms that constitutional principal, declaring: 'The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.' Nonetheless, after the adoption of the Federal Rules, attempts were made indirectly to undercut that right by having federal courts in which cases involving both legal and equitable claims were filed decide the equitable claim first. The result of this procedure in those cases in which it was followed was that any issue common to both the legal and equitable claims was finally determined by the court and the party seeking trial by jury on the legal claim was deprived of that right as to these common issues. This procedure finally came before us in *Beacon Theatres, Inc. v. Westover*, a case which, like this one, arose from the denial of a petition for mandamus to compel a district judge to vacate his order striking a demand for trial by jury.

"Our decision reversing that case * * * emphasizes the responsibility of the Federal Courts of Appeals to grant mandamus where necessary to protect the constitutional right to trial by jury. * * *"

This holding that the Constitution requires a jury trial is fully applicable here. A jury cannot be denied merely because the counterclaim is in the same proceedings with other issues in which no jury is provided. And since a referee cannot conduct a trial by jury, the trustee can bring an ordinary plenary action to seek whatever money damages he may be entitled to.

As Judge Phillips said, the court below has forced a choice on a claimant. He can forego his rightful claim to part of the bankrupt estate; or, he can give up his constitutional right to a jury trial on a counterclaim. Such a condi-

tion to a constitutional right cannot be imposed. See *Schneider v. Rusk*, 377 U.S. 163.

Under Amendment VII, the denial of a trial by jury by the court below was in error.

CONCLUSION

The judgment of the court below should be reversed.

Respectfully submitted,

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APPENDIX A**STATUTES**

Section 2(a) (7) of the Bankruptcy Act, 11 U.S.C.
11(a) (7):

The courts of the United States * * * are hereby invested * * * with such jurisdiction * * * to * * *

"Cause the estate of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, except as herein otherwise provided, and determine and liquidate all inchoate or vested interests of the bankrupt's spouse in the property of any estate whenever, under the applicable laws of the State, creditors are empowered to compel such spouse to accept a money satisfaction for such interest; and where in a controversy arising in a proceeding under this title an adverse party does not interpose objection to the summary jurisdiction of the court of bankruptcy, by answer or motion filed before the expiration of the time prescribed by law or rule of court or fixed or extended by order of court for the filing of an answer to the petition, motion or other pleading to which he is adverse, he shall be deemed to have consented to such jurisdiction."

Section 60(b) of the Bankruptcy Act, 11 U.S.C. 96(b):

"Any such preference may be avoided by the trustee if the creditor receiving it or to be benefited thereby or his agent acting with reference thereto has, at the time when the transfer is made, reasonable cause to believe that the debtor is insolvent. Where the preference is voidable, the trustee may recover the property or, if it has been converted, its value from any person who has received or

converted such property, except a bona-fide purchaser from or lienor of the debtor's transferee for a present fair equivalent value: Provided, however, That where such purchaser or lienor has given less than such value, he shall nevertheless have a lien upon such property, but only to the extent of the consideration actually given by him. Where a preference by way of lien or security title is voidable, the court may on due notice order such lien or title to be preserved for the benefit of the estate, in which event such lien or title shall pass to the trustee. For the purpose of any recovery or avoidance under this section, where plenary proceedings are necessary, any State court which would have had jurisdiction if bankruptcy had not intervened and any court of bankruptcy shall have concurrent jurisdiction."